Dynatron Bondo Corporation *and* Amalgamated Clothing and Textile Workers Union, AFL–CIO. Case 10–CA–24259

April 12, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On September 18, 1990, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Dynatron Bondo Corporation, Atlanta, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Insert the following as paragraph 2(e).

''(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.''

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Contrary to the judge, we do not rely on the Respondent's employee handbook or the statement of the Respondent's counsel at the hearing that the Respondent opposed the Union as evidence of union animus. Instead, we infer animus from all the circumstances surrounding the discharge of employee Baskin. *Abbey's Transportation Services*, 284 NLRB 698 (1987), enfd. 837 F.2d 575 (2d Cir. 1988); *Process & Pollution Control Co.*, 225 NLRB 1351, 1356 (1976), enf. denied on other grounds 588 F.2d 786 (10th Cir. 1978).

We find it unnecessary to pass on the judge's finding as to the exact date Personal Manager Tomkowicz resumed his review of attendance records or his finding that Plant Manager Fragnoli was the highest ranking official in the plant.

[3] The judge inadvertently omitted the notification paragraph from his recommended Order. We shall modify the recommended Order accordingly.

Mary L. Bulls, Esq., for the General Counsel.
Walter O. Lambeth Jr., Esq. and *R. Read Gignilliat, Esq.*, of Atlanta, Georgia, for the Respondent.
Robert S. Giolito, Esq., Atlanta, Georgia, and *Joan Carter*, of College Park, Georgia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This case was tried in Atlanta, Georgia, on May 18 and 21, 1990. The charge was filed on July 20, 1989, and the complaint issued on December 20, 1989.

The complaint alleges that Respondent discharged its employee Earnestine Baskin in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

On the basis of the entire record, including my observation of the witnesses and their demeanor, and after considering briefs filed by counsels for the General Counsel, Respondent, and the Charging Party, I make the following findings.

On June 19, 1990, Respondent moved to correct the record. Respondent's motion involved page 34 of the transcript. By letter dated June 18, 1990, the court reporter advised that the original transcript page 34 was inaccurate, and she enclosed a corrected page 34. All parties were advised of that correction. I hereby grant Respondent's motion, receive the corrected page 34 and direct its substitution in the transcript in place of the original transcript page 34.

On July 25, 1990, counsel for the General Counsel filed a motion to strike and return Employer's supplemental posthearing brief. Respondent (the Employer) filed two briefs. Its supplemental posthearing brief was not authorized. I agree with the General Counsel. The General Counsel's motion is granted.

Respondent admitted that it is and has been at material times, a Georgia corporation with a business located in Atlanta, where it is engaged in the manufacture of automobile filler and other automobile products; that, during the past calendar year, a representative period, it sold and shipped from its Atlanta facility, goods valued in excess of $50,000 directly to customers located outside the State of Georgia; and that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent admitted that the Charging Party (the Union) is, and has been at material times, a labor organization within the meaning of Section 2(5) of the Act.

Earnestine Baskin

The General Counsel and the Union contend that Respondent discharged Earnestine Baskin on July 14, 1989, shortly after it learned that she was engaged in helping the Union organize its facility. Baskin was allegedly fired because of work attendance problems. The General Counsel and the Union contend that Baskin's attendance problems had existed for a long time, but it was not until Respondent learned of her union activities, that she was discharged.

Respondent indicated during the hearing that it had opposed the Union. However, it contends that Baskin was not discharged because of her union activities.

Baskin worked for Respondent as a packer II at the time of her discharge. She was employed from April 15, 1987, until July 14, 1989.

Union Activities

According to Earnestine Baskin, she became involved in union activities in May 1989. She talked to other employees, solicited about 12 authorization card signatures at work and

in the parking lot, and attended about a dozen union meetings.

As noted above, Respondent admitted during the hearing that it opposed the Union. Respondent's handbook contains a statement regarding union organizing at its facility:

WHAT ABOUT UNIONS

> It is almost a certainty that one or more labor unions will try to gain additional members by aggressively soliciting you and conducting organizing activities over the months and years ahead. For this reason, it is appropriate that you understand Dynatron/Bondo's position concerning this matter.
>
> You do not need a union to get fair treatment. It is a company-wide policy to provide fair treatment in pay, benefits and working conditions for all employees. Signing a union card is a serious matter. Your signature is valuable to the union and you should not sign anything without knowing fully to what you are committing yourself. In any event, don't sign a card just to please someone else or get a union organizer to leave you alone.
>
> You do not need anyone else speaking for you. You can do *your own* talking to your supervisor or any other member of management in the organization.
>
> Historically, most Dynatron/Bondo employees have not felt the need for a union in their quest for job security and satisfaction. Dynatron/Bondo hopes its employees will continue to feel the same way and in turn expects to continue its pledge to make company and employee goals as similar as possible.
>
> In summary, do not let yourself be persuaded that signing a union authorization card is ''the thing to do.'' Carefully consider the many benefits of your job that are yours without the need to pay union dues, which risk the loss of your pay through strikes, work stoppages, fines and other costs of union membership.

Baskin testified about an incident that occurred on Monday of the week of July 14, 1989:

> I was on break so I was up near the front, near shipping. I was in the break room when two of the guys came from shipping on the cars, so I came to them and was talking to them about the Union. So I looked over and seen the plant manager, Lee Fragnoli. So one guy said, just go on and leave us alone because Lee is gonna say something. I said, I'm on my break. I can give you a card and you can sign it and give it back to me later. Lee Fragnoli looked indifferent and went on.

Baskin went on later in her testimony:

> Q. Were you passing out cards when (Fragnoli) saw you?
>
> A. I had two cards. I gave one to Chris Shanna (phonetically). I gave the other one to Cecil Tyson. Cecil said, you better go on. I said, I'm on break.
>
> Q. How far away from Mr. Fragnoli were you when you were passing out the cards to these employees?
>
> A. About as far as from here to Joan (indicating).

Respondent's counsel estimated the distance indicated by Baskin to be 30 feet.

Earnestine Baskin testified about a conversation she had with a person she identified as Quality Control Supervisor Jim Plitt ''on the day before July 13, 1989.''

As to that testimony, it is not clear whether Baskin was conveying that she had a conversation with Plitt on the day before her discharge, which would be July 13, or, whether the conversation was on the day before July 13. That issue was discussed but was never clarified on the record.

Plitt came over to her machine,

> . . . He complimented me on my work and we was talking, you know, just talking. So I said, Jim, I said, what's your position? I was letting him know we had discussed and talked to different ones about forming a union and getting people to sign cards.
>
> I said, we talked about you last night and I don't want to be misquoted. I said, I told them that you were the supervisor over quality control. They are confused, you know, because we don't want to come to you if you are under management and we want to form a union. He laughed and I said, are you supervisor or what? He said, yes, I'm supervisor of quality control. They didn't know whether he was Mr. Abdul's right-hand man or whether he was—
>
> . . . .
>
> Well, I told him—I don't want him to know that I was trying to get him in no trouble. I just asked him if he could sign a card for me. He told me he was a supervisor, and well, management can't sign.

Baskin testified that another employee, Terry Frazier, heard the last of her conversation with Plitt.

Earnestine Baskin was asked if she ever mentioned the Union to her supervisor. She testified:

> The day before, on that Wednesday because he came—I was up at the machine and Jim (Ivy) came over. You know, he likes to bull a lot. He came over and he said Earnestine, Martha and Pat got your name up there in a mess, you know. He used some foul language. . . .
>
> Jim came back to the machine. He was telling me that they had stirred my name up in the front. I said what, the Union? He said, oh, you know what I'm talking about, and he walked off.

The above testimony followed Baskin's testimony about her conversation with Jim Plitt. The Wednesday before July 13 was July 12, 1989.

Disciplinary Action

Earnestine Baskin was awarded three notices of disciplinary action in 1989.

On June 29, 1989, Baskin received a notice of disciplinary action.

Baskin testified that she talked with her supervisor, Jim Ivy, about that disciplinary notice:

> He explained to me that he was gonna have to suspend me for being out. Even though I had given him

paperwork stating why I was out, he told me that he was gonna have to suspend me.

The June 29 notice included among others, the following comments:

> Earnestine has been absent from work 7 times in less than a calendar year 2–7, 4–10, 4–19, 5–3, 5–11, 6–19 and 6–27–89.
>
> This is Earnestine's 3rd disciplinary action notice. She is being suspended for 1 day with out pay the suspension day is Fri 6–30–89. She has also been told if her absenteeism and tardiness continues she will be terminated.

Baskin testified that when Ivy gave her the warning,

> he said, Earnestine, if you be late or if you've got to leave early for anything else—I don't care what it is—they're gonna suspend you. Now this is to keep me here. I said, okay, Jim, the only thing I can do is bring a subpoena. He said if I can get it okayed through Fragnoli on the 19th, I got it cleared.
>
> Okay. I went to court. When I came back on the 27th with the same problem he suspended me. So he told me if he suspended me—If you be late one more time or leave early one more time you're fired.

On June 10, 1989, Baskin received a notice of disciplinary action. She testified about her conversation with Supervisor Ivy about that notice:

> On the 8th he was explaining to me because I had talked to him about some things as to why I was getting off early and he accepted it. I had given him papers. He said, Earnestine, I've got to be honest with you. You're gonna have to stop getting off early because they're giving me hell up in the front office.
>
> I said, well, Jim, I bring you my subpoenas and things. He said, Earnestine, I know it. He said, we reviewed your attendance records and everything with you leaving early, and you know, even though I approve it they reviewed it and I hadn't been writing you up like I should. By the record you should have been fired, but by it being a goof on my behalf, my boss is done got on my ass. He said, that's why you are not fired. It's a mistake of mine.

The June 10 notice included comments including:

> Earnestine was given a verbal warning for tardiness on 3–20–89. She had been tardy 7 times, she has been tardy or left early times (sic) since her verbal warning. 3–31, 4–4, 4–27, 5–15, 6–5, & 6–8–89.
>
> Earnestine is being given a written warning for tardiness and told if she is tardy or leaves early again in this calendar year she will be suspended for excessive tardiness.

On March 20, 1989, Baskin received a notice of disciplinary action and the comments included:

> Earnestine has 7 tardy's from Jan 1st until now. 1–3–89, 1–10–89, 1–18–89, 1–26–89, 3–8–89, 3–13–89, 3–14–89.
>
> Earnestine is being given an oral warning for excessive tardiness.

Discharge

According to Baskin, she was not absent or tardy, nor did she leave work early, from the time she was suspended on June 30, 1989, until she was discharged on July 14.

Baskin testified about her discharge,

> About fifteen minutes before we was getting ready to get off Jim came up to the machine. He said, Earnestine, you and I have got to go up to see Fragnoli and Abdul. I said, for what? He said, Earnestine, I have no idea.
>
> We went on upstairs. So when we got up there Lee Fragnoli had my attendance records in front of him. He asked me, he said, Earnestine, upon reviewing you attendance records and seeing how many times you've done been late and been leaving early, you've exceeded over the Company time, you know, minimums that you can be allowed.
>
> I said, but Lee Fragnoli it was my understanding that that paper I signed after I was suspended for leaving early for going to court that as long as I didn't be late no more or leave early or be out I was safe. He said, Earnestine, you go on because you already done been over the amount that the Company required.
>
> I just sit there and I was paranoid—I just—So he asked me if I would just go on and leave and he said, the security guard will escort you out. He told my supervisor to go with me and he said, Earnestine, could you just leave. I got on up and come out.

The interoffice memorandum dealing with Baskin's July 14 discharge read:

> On January 1, 1989, Dynatron/Bondo's Attendance Policies and Procedures was revised (Policy #400.08). This policy breakdowns the action to be taken for failure to follow this procedure.
>
> In 1989 alone, you had fourteen (14) tardies (combination of tardies and left early). Additionally, there are three (3) absences.
>
> In 1988 you had four (4) tardies (combination of tardies and left early). Additionally, there were seven (7) absences.
>
> This is unacceptable and according to the policy, is dischargeable. Effective end of shift Friday, July 14, 1989, you are being terminated for failure to comply with Policy #400.08.

The revised Attendance Policies and Procedures of January 1, 1989, defines absences and tardiness, and provides, among other things:

> I. *Attendance/Tardiness Policy*
>
> . . . .

Attendance/Tardiness disciplinary actions can be combined with other warnings to result in termination if an employee receives five (5) disciplinary actions in a year.

Number of Absences per Calendar Year	Number of Tardinesses per Calendar Year	Action Taken
1–4	1–6	None
5	7–9	Verbal Warning
6	10	Written Warning
7	11	Probation/Suspension
8	12	Termination

Earnestine Baskin testified that she was told by her supervisor, Jim Ivy, that some absences could be excused:

> (On June 8, 1989, Ivy) sit me down and explained to me that leaving early was just as bad as being late. I said, even with a court subpoena, Jim? He said, I can get you off, you know, by that because he said he have the privilege of writing ''excused'' or ''unexcused'' on my time card. So I said, well, Jim, I got a subpoena. He said, you got to go to court if you got a subpoena. I said, because you right or they're gonna lock me up. I never been to jail so I didn't want to go. My supervisor had the authority to excuse and unexcuse me. He said this to me himself.

Baskin explained her June 8 conversation with Ivy:

> He explained that during—He wanted me to go and drop some charges from a girl because we was gonna go to court about some problems we had. He came to me. Him and Margaret asked me to go down and drop some charges off the girl I had taken a warrant off of. I said, Jim, that's gonna be just as bad because I'm gonna still be leaving early. He said, I have the authority to excuse you so it won't be held against you.
>
> But he excused me for that, but when we went to court, because I couldn't drop the charges he didn't excuse that. That's on the 4th. So he told me that's the reasons as to why he could do it.
>
> Q. So on June 8th did you learn—Let me ask you this way; How was your leaving early on April 4th treated on June 8th; do you recall?
>
> A. That's when he explained to me. He used that as an example to explain to me how he can use his own discretion as being the supervisor to honor excused and unexcused.

Credibility

Earnestine Baskin

Earnestine Baskin's testimony did not contain any obvious conflicts. She was questioned at length on cross-examination regarding when she learned that leaving early constituted a tardy under Respondent's attendance rules. Baskin persisted in testifying that she did not know that was the rule until it was explained to her on June 8, 1989. In that regard she acknowledged that the attendance policy and procedure notice which was posted from January 1, 1989, stated that leaving early would qualify as a tardy. However, she testified that regardless of that fact, she did not realize that was the practice until it was explained to her on June 8.

Baskin admitted that her August 2, 1989 affidavit did not mentioned an incident where Plant Manager Fragnoli was in the area where she passed union authorization cards to other employees, nor did it include her testimony that Supervisor Jim Ivy told her he had not been doing his paperwork regarding her absences. She testified that the Board agent taking her affidavit failed to include several matters that she had told him.

I see nothing in that record itself which makes Baskin's testimony unbelievable. The fact that Baskin did not understand a posted notice or that she failed to include in her prehearing affidavit, everything included in her live testimony, does not, in and of itself, show that she is not a credible witness.

Respondent's Defense

In defense of the allegations Respondent presented the testimony of Personnel Manager Fred Tomkowicz.

Tomkowicz testified that he was hired by Respondent on July 10, 1989. In his interview for his current position, it was emphasized to Tomkowicz that Respondent had an absenteeism problem.

On July 14 Tomkowicz began viewing the employees' attendance cards in alphabetical order. According to Tomkowicz, when he came to Earnestine Baskin's card he saw that she should have been discharged before that time due to her tardy and absence record during 1989. He then insisted to Plant Manager Fragnoli that Baskin be discharged. Fragnoli offered no objection and Baskin was discharged.

Tomkowicz testified that after Baskin's discharge, he did not return to his review of attendance records until about a week later at which time he completed his review. Tomkowicz decided to clean the slate from July 1989, as to all employees' attendance records, except for Baskin, who had already been discharged. Tomkowicz took that action because he had no way of knowing which employees were involved with the Union and he did not want to unknowingly discipline any employee that was involved in supporting the Union. In that regard Tomkowicz testified as follows:

> I chose to throw out as though you were hired in July so that there would not be any inference that it could be in lieu of a unionization campaign. So if you happened to have a union persuasion and happened to have gotten fired that next week, come back and say, oh, I'm fired because of unionization. I chose not to give any appearance of that, and that was the way that I could do that.

Tomkowicz did not mention, but the record shows, that the unfair labor practice charge alleging Baskin's discharge was filed on July 20 and served on Respondent on July 21, 1989. July 21 is 1 week after Baskin's discharge—the day when, according to Tomkowicz, he was able to resume his review of the employees' attendance records.

Therefore, on the basis of attendance records through July 14, no one other than Earnestine Baskin was discharged. Since that date, Tomkowicz has to date discharged some 19 other employees.

Tomkowicz admitted that he had heard rumors before he discharged Baskin on July 14 that she had been involved in a fight with another employee. However, he denied that he had heard rumors about Baskin's union activities.

According to Tomkowicz, he did not talk to Baskin's supervisor regarding her termination. He only talked with Plant Manager Fragnoli even though he admitted that he does from time to time discuss an employee with the employee's supervisor before terminating that employee.

Supervisory Issue

Respondent offered testimony which called into question the supervisory authority of James Plitt. Personnel Manager Tomkowicz testified that Plitt was employed by Respondent as a quality control chemist from May 16, 1989, until July 21, 1989. Tomkowicz testified that Plitt did not have authority to hire, fire, discipline, lay off, or to effectively recommend any of those things.

The only evidence offered by the General Counsel concerning the supervisory authority of Plitt involved a conversation between Plitt and Earnestine Baskin:

> . . . (James Plitt came to my machine and he) complimented me on my work and we was talking, you know, just talking. So I said, Jim, I said, what's your position? I was letting him know we had discussed and talked to different ones about forming a union and getting people to sign cards.
>
> I said, we talked about you last night and I don't want to be misquoted. I said, I told them that you were the supervisor over quality control. They are confused, you know, because we don't want to come to you if you are under management and we want to form a union. He laughed and I said, are you supervisor or what? He said, yes, I'm supervisor of quality control.

Baskin's testimony, standing alone, is not competent to illustrate whether Plitt was a supervisor. To that question, the comment by Plitt to the effect that he was a supervisor is hearsay. Moreover, there was no evidence illustrating that Plitt possessed authority to hire, fire, discipline, lay off or effectively recommend hiring, firing, disciplining, or laying off employees.

I find that the record evidence fails to show that James Plitt was a supervisor at material times.

Findings

The evidence which tends to support the General Counsel includes evidence of knowledge, opposition to union activity, timing, and disparity.

As shown above, Earnestine Baskin testified that Plant Manager Fragnoli watched from 30 feet away while she passed union authorization cards to two employees on Monday, July 10, 1989. Baskin was in Respondent's facility at that time on her break. Baskin also testified that she had a conversation with her supervisor on Wednesday, July 12, 1989, in which she and Supervisor Jim Ivy discussed other employees linking Baskin's name with the Union.

As to Fragnoli, Respondent argues that it can safely be assumed that Fragnoli was consumed with his task of escorting visitors and was not aware of what Baskin's card solicitation was; that judicial notice may be taken that Fragnoli could not read the print on the cards from 25 or 30 feet away; that the incident does not appear in Baskin's prehearing affidavit; and that Baskin's testimony that Fragnoli looked indifferent shows that Fragnoli was unaware of what was occurring.

I disagree with the above points. Fragnoli did not testify and there was no showing of why he did not testify. Plant Manager Fragnoli was the highest ranking official material to the incidents involved in these proceedings. Under those circumstances, I am unable to make any assumptions to the effect that Fragnoli would testify in a manner which would support Respondent's position. I must do the opposite. I must assume that Fragnoli's failure to testify illustrates that his testimony, if given, would have been harmful to Respondent's position.

> An adverse inference is properly drawn regarding any matter about which a witness is likely to have knowledge if a party fails to call that witness to support its position and the witness may reasonably be assumed to be favorably disposed to the party. McCormick, *Evidence* at 272 (3d ed. 1984); 2 Wigmore, *Evidence* at 286 (2d ed. 1940); *Pur O Sil, Inc*., 211 NLRB 333, 337 (1974). . . . [*Property Resources Corp*., 285 NLRB 1105 fn. 2 (in part) (1987).]

Therefore, I cannot assume that Fragnoli was consumed with his task of escorting visitors; or that he was unaware of the nature of the cards Baskin was distributing; or that Fragnoli was unaware of what was occurring. If such was the case Fragnoli should have appeared and said as much.

As to Jim Ivy, Respondent argues, in essence, that the testimony regarding the Ivy-Baskin conversation on July 12 fails to show that Baskin's union activities were discussed. Jim Ivy did not testify. The credited testimony of Earnestine Baskin, included the following:

> The day before, on that Wednesday because he came—I was up at the machine and Jim (Ivy) came over. You know, he likes to bull a lot. He came over and he said Earnestine, Martha and Pat got your name up there in a mess, you know. He used some foul language. . . .
>
> He was telling me that they had stirred my name up in the front. I said what, the Union? He said, oh, you know what I'm talking about, and he walked off.

Again, I disagree with Respondent's argument, the above testimony shows that Jim Ivy learned that Baskin's name was being associated with the Union.

As to animus, Respondent's counsel admitted that Respondent opposed unionization. Moreover, as shown above, Respondent's handbook contains a statement in opposition to unionization.

Regarding timing, the first knowledge Respondent had of Baskin's union activities occurred on Monday, July 10. On Wednesday, July 12, Respondent, through Supervisor Ivy,

heard more about Baskin's union activities and her involvement was confirmed during a conversation between Ivy and Baskin.

As to disparity, the evidence shows that Respondent did not follow the letter of its attendance policy in discharging Baskin.

That policy reads (in part):

> I. *Attendance/Tardiness Policy*
>
> . . . .
>
> Attendance/Tardiness disciplinary actions can be combined with other warnings to result in termination if an employee receives five (5) disciplinary actions in a year.

During 1989, before her July 14 discharge, Earnestine Baskin received only three disciplinary actions. Baskin was suspended by notice dated June 29. She received a written warning dated June 10 and an oral warning on March 20.

Baskin did not qualify for discharge under the above-quoted standard.

It is true, as Respondent argues in its brief, that Baskin exceeded the number of tardies which constitute grounds for discharge under the above-quoted attendance/tardiness policy. However, as shown above, that same attendance/tardiness policy provides for a progressive discipline system. Respondent did not show why it decided to circumvent that progressive system in the case of Baskin. After Baskin's suspension, she was not absent or tardy during the remainder of her employment. Respondent did not show that it has at any other time, regarding any other employee, circumvented the progressive disciplinary procedure in the manner used against Baskin.

Moreover, Personnel Manager Fred Tomkowicz admitted that Baskin was treated differently than other employees. Respondent admittedly did not discharge anyone else on the basis of attendance/tardiness before Baskin. Moreover, after her discharge, according to Tomkowicz, he decided to wipe the attendance slate clear for all employees other than Baskin, after he completed reviewing the attendance records around July 21, 1989.

In view of the above, I find that the General Counsel proved, prima facie, that Baskin's union activities were a contributing factor in her discharge. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Additionally, the General Counsel argued in her brief that exhibits in the record illustrate that other employees also had attendance records which, if the same standard was applied as in Baskin's case, would have justified disciplinary action. According to Personnel Manager Tomkowicz his consideration of those records was curtailed when he decided to forego further action due to the union campaign.

In view of my finding above, I shall consider whether Respondent proved that Baskin would have been discharged in the absence of protected activities. In that regard Respondent offered the testimony of Fred Tomkowicz. Tomkowicz testified that he was not aware of Baskin's union activities when he recommended her discharge on July 14.

Respondent argued that in fact the event which precipitated events that led to Baskin's discharge was the employment of Tomkowicz on July 10, 1989.

Respondent argues that Tomkowicz was the moving official in Baskin's discharge.

However, the uncontested record shows that the discharging official was Plant Manager Leigh Fragnoli. Respondent acknowledged with the following footnote that even though Tomkowicz made a recommendation to Fragnoli the termination document was prepared by Fragnoli:

> The notice of termination prepared by Fragnoli sets forth Baskin's attendance infractions in both 1988 and 1989. GCX No. 3. Tomkowicz, however, based his decision to terminate Baskin's employment solely on her 1989 infractions. Tr. 202–203. The 1988 infractions were inserted by Fragnoli without input by Tomkowicz. Tr. 203. In directing Fragnoli to tend to Baskin's discharge, Tomkowicz provided him with Baskin's personnel file, thereby making the 1988 information available to him. Id. (R. Br. p. 4, fn. 2.)

While the above comment illustrates that Fragnoli was in full control of the termination of Baskin, some portions of the above quote are not supported by the record or are misleading. For example, according to Tomkowicz it was not Baskin's personnel file which he reviewed but her attendance record. Moreover, Tomkowicz was the personnel manager. Fragnoli was the plant manager. The record testimony by Tomkowicz indicates that he insisted that Baskin be discharged. The record does not support, and their respective positions belie, the contention that Tomkowicz did, or could, direct Fragnoli to discharge Baskin.

I find that the record does not support Respondent. The evidence does not show that Baskin would have been discharged in the absence of protected activities. The evidence does show that no other employee was treated like Baskin. At the time of her discharge Respondent had discharged no one else for similar attendance problems. Baskin was denied the application of Respondent's stated progressive discipline system and Respondent failed to show that it has ever denied application of that system to any other employee.

In regard to Respondent's contention that it was the employment of Tomkowicz and his July 14 review of Baskin's attendance record that caused the discharge on July 14, the record shows that in fact Respondent learned nothing through Tomkowicz' review that it had not known since early June. The uncontested testimony of Baskin illustrated that Respondent was aware on June 8, 1989, that her attendance/tardy numbers could justify discharge. On that date Baskin's supervisor, Jim Ivy, told Baskin,

> we reviewed your attendance records and everything with you leaving early, and you know, even though I approve it they reviewed it and I hadn't been writing you up like I should. By the record you should have been fired, but by it being a goof on my behalf, my boss is done got on my ass. He said, that's why you are not fired. It's a mistake of mine.

The record shows that from at least June 8, 1989, Respondent knew that the attendance/tardy record of Baskin, standing alone, could be used to justify her discharge. On June 29 Respondent had another occasion to consider discharge. Instead, and in accord with its written progressive disciplinary system, Baskin was suspended for 1 day.

Regardless of what Personnel Manager Tomkowicz learned on July 14, the official that discharged Baskin, Plant Manager Fragnoli, was aware of her attendance record from well before his knowledge of Baskin's union activities.

After her suspension Baskin did nothing to trigger further disciplinary action. She had no absences or tardies after her suspension. There was nothing, other than her union activities which became apparent to Respondent, which occurred at a date proximate to her discharge.

I find that Respondent failed to proved that Earnestine Baskin would have been discharged in the absence of her union activities. *D & D Distributing Co.*, 277 NLRB 909 fn. 1 (1985); *Ann's Laundry*, 276 NLRB 269 (1985); *NLRB v. General Warehouse Corp.*, 643 F.2d 965 (3d Cir. 1981).

CONCLUSIONS OF LAW

1. Respondent Dynatron Bondo Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Amalgamated Clothing and Textile Workers Union, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by discharging and refusing to reinstate Earnestine Baskin, violated Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. As I have found that Respondent unlawfully discharged Earnestine Baskin, I shall recommend that Respondent be ordered to offer Baskin immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges.

Respondent must expunge all references to the discharge of Baskin from her record and notify her that those records have been expunged and that her July 14, 1989 discharge will not be used against her. Additionally, in view of the fact that Respondent cleaned the slate of all references to absences and tardies for all employees during July, 1989, that same action must be taken regarding the record of Earnestine Baskin. I recommend that Respondent be ordered not to use any of Baskin's 1989 absences and tardies against her in any way.

I shall further recommend that Respondent be ordered to make Baskin whole for any loss of earnings she suffered as a result of the discrimination against her. Backpay shall be computed in the manner described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[1]

[1] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The National Labor Relations orders that the Respondent, Dynatron Bondo Corporation, Atlanta, Georgia, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Discharging, refusing to reinstate, and otherwise discriminating against employees because of their union or other protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Earnestine Baskin immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent job without prejudice to her seniority or other rights or privileges previously enjoyed, and make Baskin whole for any loss of earnings, plus interest, suffered because of its illegal action.

(b) Remove from its files any reference to the termination of Baskin and notify Baskin in writing that this has been done and that evidence of her unlawful suspension or termination will not be used against her in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, and timecards, personnel records, reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Atlanta, Georgia, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge our employees because of their activities on behalf of Amalgamated Clothing and Textile Workers Union, AFL–CIO, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer immediate and full employment to Earnestine Baskin to the position she formerly held or, if that position no longer exists, to a substantially equivalent position without prejudice to her seniority or other rights and privileges.

WE WILL make Earnestine Baskin whole for all losses of earnings she suffered by reason of our discrimination against her.

WE WILL expunge from our records any reference to our discharge of Earnestine Baskin and all references to absences and tardies of Baskin during 1989, and WE WILL notify Baskin in writing of our action in that regard.

DYNATRON BONDO CORPORATION